SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term 1968

No. 272

ROSA ELLA GRAHAM BEASLEY, ET AL
Petitioners,

versus

W. P. H. McFADDIN, JR., ET AL
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED 2

STATEMENT OF THE CASE 3

1. Jurisdiction of the District Court 3

2. Proceedings in the Courts Below and Facts Material To the Questions Presented 3

REASONS FOR GRANTING THE WRIT 6

1. The depositions to perpetuate testimony violate the Fifth and Fourteenth Amendments to the Constitution of the United States 6

2. Summary Judgment should not have been granted because genuine issues of material fact existed. 10

CONCLUSION 13

CERTIFICATE OF SERVICE 14

APPENDIX A:

Constitutional provisions, statutes and Federal and State Rules of Civil Procedure involved. 16

APPENDIX B:

Opinions of the United States Court of Appeals for the Fifth Circuit. 31

SUBJECT INDEX (Continued)

Page

Judgment of the United States Court of Appeals for the Fifth Circuit. 47

TABLE OF AUTHORITIES

CASES:

Colby v. Klune, et al, 2nd Cir. 178 F 2d 872 12

Blackburn vs. Alabama, 361 U.S. 199 9

Cockrell v. Texas Gulf Sulphur, 229 SW 2d 672, Sup. Ct. 10

Juster Brothers vs. Christ Gau, 7 NW 2d 507 9

Mitchell vs. McCarty, 239 F 2d 721-723 (7th Cir.) 12

United States v. Zacks, 375 U.S. 59 6

Washington Post Company vs. Keogh, 365 F 2d 965, cert. den. 385 U.S. 1011 11

FEDERAL CONSTITUTION:

Fifth Amendment to the Constitution of the United States 2, 16

Fourteenth Amendment to the Constitution of the United States 2, 16

STATUTES:

Article 3742, T.C.S., as amended, Acts 1927, 40th Leg. p. 76, ch. 53, sec. 1 ..... 2, 7, 8, 16

FEDERAL COURT RULES

Rule 27, F.R.C.P. 2, 7, 18

Rule 56, F.R.C.P. 2, 10, 13, 20

TABLE OF AUTHORITIES (Continued)

Page

TEXAS COURT RULES

Rule 187, T.R.C.P. 2, 22

MISCELLANEOUS:

16a, C.J.S. Constitutional Law Section 567 8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Rosa Ella Graham Beasley, et al, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 9, 1968.

OPINIONS BELOW

The opinion of the district court is in the record (R. 457) and is not reported. Findings of fact and conclusions of law is in the record. (R. 462-465). The opinion of the court of appeals is in the record (R. Vol. VII, p. 293) and not yet reported and is appended hereto with its judgment (R. Vol. VII, p. 297). (Appendix B).

JURISDICTION

The judgment of the court of appeals was entered on the 9th day of April 1968. (R. Vol. VII, p. 297). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Do exparte depositions, where taken after notice by publication, without the appointment of counsel to represent the interests of the adverse parties so cited, such persons not having appeared, violate the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States by denying such parties due process?

2. Can a motion for summary judgment be granted even though there exists a genuine issue of material fact as contemplated by F.R.C.P. 56.

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States. The statutes involved are T.C.S. Art. 3742; T.C.S. Art. 5507; T.C.S. Art. 5509; T.C.S. Art. 5510; T.C.S. Art. 5519; T.C.S. Art. 5519a; T.C.S. Art. 5526; T.C.S. Art. 5527. The federal and state rules involved are Rule 27, F.R.C.P.; Rule 56, subsection (c) F.R.C.P. and Rule 187, T.R.C.P. These are all printed in Appendix A, infra. p. 16.

STATEMENT OF THE CASE

1. Jurisdiction of the District Court

On the first day of September, 1964, this action was filed by Rosa Ella Graham Beasley, et al (Beasley, et al) against W. P. H. McFaddin, et al (McFaddin, et al). The matter in controversy exceeds $10,000 in value and the case arises under the Constitution and the laws of the United States. Jurisdiction of the District Court was invoked under 27 U.S.C. 1331 (R. Vol. I, pp. 36, 37 & 38).

2. Proceedings in the Courts Below and Facts Material to the Questions Presented

Beasley, et al sued to recover an undivided 7/30ths right, title and interest in the league of land granted to one Pelham Humphries on February 14, 1835, by the State of Coahuila and Texas, Republic of Mexico. Beasley, et al constitute 7/30ths of all of the heirs of Pelham Humphries. They allege that Pelham Humphries died intestate about 1842. (R. 29). The league of land was never sold or conveyed by *Pelham* Humphries.

The Defendants all plead the Texas Statutes of Limitations. Two year statute (T.C.S. 5526), the Three year (T.C.S. 5507), the Four year (T.C.S. 5527), the Five year (T.C.S. 5509), the Ten year (T.C.S. 5510) and the Twenty-five year (T.C.S. 5519). Additionally the Defendants plead T.C.S. 5519a to the effect that Beasley, et al had not exercised dominion over the lands for more than

one hundred twenty-seven years; that McFaddin, et al and their vendees had exercised dominion and assumed to claim the lands and/or minerals for twenty-five years, with further Pleas of Laches and a Regular Recorded Chain of Title from the Sovereignty. These defenses were either specifically set forth or were plead by adoption of such specific pleadings. Answers of Texas Gulf Sulphur Company (R. Vol. I, pp. 114-146) and W. P. H. McFaddin, et al (R. Vol. I, pp. 162-182), comprehensively set forth such defenses.

The trial court ordered the establishment of a "Common File" which any party was authorized to file any instrument or document which the tendering party believed to be pertinent to any motion for summary judgment or to the trial. (R. Vol. II, p. 307). The "Common File" consisted of two volumes referred to as "CF 1" and "CF 2".

McFaddin, et al, filed a motion for summary judgment on October 28, 1965. (R. Vol. II, pp. 337-356). On November 2, 1965, Pan American Corp. filed a supplemental motion for summary judgment. (R. Vol. II, pp. 356-358). On November 26, 1965, Jef Caison Townsite Company, as its motion for summary judgment adopted the motion of McFaddin, et al. (R. Vol. II, pp. 359-360). On May 25, 1966, Oakwood Realty Company as its motion for summary judgment adopted the motion for summary judgment filed by the other Defendants. All of the motions for summary judgment were based on depositions taken to perpetuate testimony, affidavits and various recorded instruments.

On November 29, 1965, the Plaintiffs filed their opposition to the motions for summary judgment. (R. Vol. II, pp. 362-445).

The court heard the motion for summary judgment and on November 21, 1966, rendered its opinion granting the Defendants a summary judgment (R. Vol. II, pp. 457-465) and on December 5, 1966, judgment was entered for Defendants. (R. Vol. II, pp. 466-477).

Notice of appeal to the United States Court of Appeals, Fifth Circuit, was filed on December 21, 1966, Designation of Contents of Record on Appeal filed on December 23, 1966, (R. Vol. II, pp. 2-5) and on the same date, Statement of Points on Appeal were filed. (R. Vol. II, pp. 8-11).

Two other cases had been filed in the same district court, namely, Eura Mae Higginbotham Green, et al, vs. The Texas Gulf Sulphur Company, et al and M. T. Humphries, et al, vs. Texas Gulf Sulphur Company, et al, which involved interests in the same property which Beasley, et al, were seeking to recover. The trial court rendered summary judgments in all three cases and the court of appeals heard arguments on all three cases at the same time. The court of appeals rendered separate opinions in each of the three cases, (R. Vol. VII, pp. 289, 293 and 299, respectively) on April 9, 1968, affirming the trial court, but stated in the Green case and the Beasley case that the reasoning set forth in the Humphries case was applicable. (R. Vol. VII, p. 290 and R. Vol. VII, pp. 294-295, respectively).

REASONS FOR GRANTING THE WRIT

1. Special and important reasons exist for the granting of a writ of certiorari for the reason that the courts below have, of necessity, denied an important question of state and federal law which has not been, but should be, settled by this Court. Special and important reasons exist because the question involved reaches constitutional dimensions in that the same are violative of the Fifth and Fourteenth Amendments to the Constitution of the United States, relating to due process. (United States vs. Zacks, 375 U.S. 59).

On July 17, 1939, the depositions to perpetuate the testimony of Sidney Eloi Broussard, E. L. Chaney, Ivy Janes, Frank B. Hammers, G. N. Lowry, S. A. Steinhagen and Christ Gentz were taken at the insistence of Stanolind Oil and Gas Company, Stanolind Oil Purchasing Company, The Texas Company, W. P. H. McFaddin, Jr. and J. L. C. McFaddin, Trustees of the McFaddin Trust, Mrs. Ida Caldwell McFaddin, S. E. Broussard, Unity Oil Company, W. W. Kyle, Sr. and Birtie Wiess, individually and as Independent Executrix of the Estate of P. H. Wiess, deceased. (CF 2 550-766). The petitioners for the deposition were all repsented by attorneys. Ewell Strong, attorney for two of None of the adverse parties appeared or were represented by attorneys. Ewell Strong, attorney for two of the petitioners, on October 20, 1965, executed an affidavit (CF 1, p. 182-189) wherein it is stated that service of process by publication was made on the heirs of Pelham Humphries or William Humphries after the filing of the petition to perpetuate the testimony of the

above named witnesses. It does not appear either in the depositions themselves or in the affidavit of Ewell Strong that any of the adverse parties cited by publication appeared, nor does it appear that an attorney was appointed to represent the interests of the adverse parties so cited. The complainants in this case are part of the unknown heirs of the adverse parties which were cited by publication.

At the time of the taking of the depositions, the statute of the State of Texas authorizing such depositions was T.C.S. Art. 3742. That statute sets forth the procedure for taking such depositions, including citation by publication, but does not require the appointment of an attorney to represent the interests of the adverse parties.

The failure of the Texas statutes to require the appointment of an attorney to represent the interests of the adverse parties is a denial of due process under the Fifth and Fourteenth Amendments to the Constitution of the United States.

The federal rules of civil procedure, Rule 27 meets the due process clause of the Constitution in that it requires the appointment of an attorney to represent the adverse party.

We recognize the fact that necessity requires the legal fiction to the effect that it would be presumed that adverse parties would become aware of the proceedings by virtue of the publication of a notice of the

taking of the depositions in a newspaper of general circulation.

Article 3742 T.C.S. specifically provides that testimony taken in such proceeding may be used in any suit which may be thereafter instituted by or between any of the parties to the statement (petition to the court for authority to take the deposition) or those claiming under them, in like manner, as if such depositions had been taken after the institution of the suit. Depositions taken for the purpose of perpetuating testimony which are made a part of the record after the institution of a suit then become a part of the evidence in the suit to the same extent as if the depositions were taken after the institution of the suit, or even to the same extent as if the witnesses were personally present and testified in open court.

The term "due process of law" is synonymous with "the law of the land", and two essential elements are notice, and an opportunity to be heard and to defend in an orderly proceeding adopted to the nature of the case. 16a C.J.S. Constitutional Law, section 567.

We do not deny that Article 3742 authorizing depositions to perpetuate testimony comports with due process insofar as the notice itself is concerned. However, Beasley, et al were denied an opportunity to be heard because of the failure of the Texas Statute to require the appointment of an attorney. The veil of the legal fiction of actual notice through citation by publication becomes too thin to include "an opportunity to be heard". "An opportunity to be heard" includes an

opportunity to be present during the taking of testimony and evidence. Juster Brothers vs. Christ Gau, 7 NW 2d 507.

The "due process clause" forbids fundamental unfairness in the use of evidence. Blackburn vs. Alabama, 361 U.S. 199. A statute or court rule which does not require the appointment of an attorney to be present with the right to cross examine a witness whose testimony is being taken in a proceeding to perpetuate testimony, does not constitute fairness. It is highly unfair to permit such witness's deposition to be taken without someone being present to cross examine such witness as to the source of his knowledge, the truth of his testimony and to solicit the testimony, if any, favorable to the adverse parties.

The balance of the scales of "fairness" should not be tipped in favor of permitting parties to bring forth their witnesses and conduct an examination of them without an attorney being present for the purpose of cross examination. It is fundamentally unfair to permit the use of such evidence and the due process clause of the Fourteenth Amendment must be so construed. Any other construction, besides being unfair, would open wide the portals of judicial proceeding to fraud upon adverse parties.

To deny Beasley, et al the right of judicial review is to deny them due process as demanded by the Fourteenth Amendment to the Constitution of the United States.

2. This Court should grant the petition for certiorari for the reason that there exists a genuine issue of material fact as required by F.R.C.P. 56.

The court of appeals, in its opinion, stated that since there was no proof that the Inglish deed (CF 1, p. 12) was forged, the fact that Pelham Humphries died after 1836 could not help the heirs because the property would go to brother William under the doctrine of after acquired title. Forgery consists of the making of a false instrument in writing, *purporting to be the act of another,* in such manner that the false instrument if the same were true, would have transferred property. The name signed to the Inglish deed is not "Pelham Humphries" but "William Humphries". In no place in such deed is there any reference to the document purporting to be the act of "Pelham Humphries". That deed is not a forged deed, but constitutes a conveyance of property to which the grantor named therein held no title. It is elementary that such a conveyance conveys only the title of the grantor. As a result, the Inglish deed conveyed no title. Cockrell vs. Texas Gulf Sulphur Company, 229 SW 2d 672 - Sup. Ct. No necessity existed for the filing of an affidavit of forgery as a forgery as defined by law did not exist.

Furthermore, the affidavit of Mrs. Elsie Carr (R. Vol. II, p. 435) states that the William Humphries who signed the Inglish deed was no relation to Pelham Humphries, but was the son of Joseph Humphries who was born in the State of Kentucky, came to Texas in 1823 and lived in Panola County, Texas. To say the very least, this affidavit creates a genuine issue of ma-

terial fact as to the identity of the William Humphries executing the Inglish deed. In any event, there exists a doubt concerning whether a genuine issue of fact exists, which fact in and of itself should require the granting of this writ and a reversal of the Courts below. (Washington Post Company vs. Keogh, 365 F 2d 965 - cert. den. 385 U.S. 1011)

The court of appeals, in its opinion, sustained the trial court wherein the district court held that the appellees had claimed title by adverse possession for the reasons stated in the Humphries vs. Texas Gulf Sulphur opinion.

The question of whether or not McFaddin, et al acquired title by limitations turns solely on whether or not it was the "intention" to hold the land in question as against the world. Intention can be only determined from facts. The facts can be determined only by a trier thereof based upon credible testimony. In this case, the testimony consists of affidavits and depositions taken to perpetuate testimony. It would only be necessary in a trial before a jury for Beasley, et al to make a prima facie case that they were the heirs of Pelham Humphries. The burden would then shift to McFaddin, et al to offer proof to establish their title. The trier of the facts would then determine the credibility of the witnesses. The trier could believe in the truth of the facts testified to, either wholly, partly or none. If the trier of the facts did not believe the testimony of the witnesses, Beasley, et al would be entitled to recover. The affidavits deny Beasley, et al the right of cross examination and deny the right of Beasley,

et al to have the credibility of the witneses passed upon.

As stated in Colby vs. Klune, et al, 2d Cir. 178 F 2d 872:

> "We have in this case one more regrettable instance of an effort to save time by an improper reversion to 'trial by affidavit', improper because there is involved an issue of fact, turning on credibility. Trial on oral testimony, with the witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common law system. For only in such a trial can the trier of the facts (trial judge or jury) observe the witnesses' demeanor; and that demeanor — absent, of course, when trial is by affidavit or deposition — is recognized as an important clue to witness' credibility. When, then, as here, the ascertainment (as near as may be) of the facts of a case turns on credibility, a triable issue of fact exists, and the granting of a summary judgment is error".

In Mitchell vs. McCarty, 7th Cir. 239 F 2d 721-723, the Court stated:

> "However, it is fundamental that a summary judgment should be granted only if there are no disputed issues of material fact and the moving party is entitled to a judgment as a matter of law. (citing cases). It follows that

issues of fact raised by pleadings and affidavits in a summary judgment proceeding may not be tried on the basis of affidavits. Campana Corp. vs. Harrison, 7th Cir. 135 F 2d 334-335" (Parenthetical insertion ours)

The granting of the summary judgment and the affirmance thereof by the court of appeals was improper as it denied Beasley, et al the right to have the credibility of the witnesses passed upon, which in and of itself created a genuine issue of material fact, thereby making improper the granting of the motion for summary judgment as authorized by F.R.C.P. 56.

The importance of the public interests with the respect to the rules of civil procedure of the state of Texas insofar as they do not require the appointment of an attorney to represent the interests of adverse parties cited by publication and the granting of the motion for summary judgment contrary to F.R.C.P. 56 requires the granting of this petition for certiorari.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted and the judgment of the courts below should be reversed.

July 5, 1968.

Respectfully submitted,

Richard H. Cocke
Attorney for Petitioners

CERTIFICATE OF SERVICE

I, Richard H. Cocke, attorney for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of July, 1968, I served copies of this petition for certiorari on the respondents named therein by depositing the same in the United States Post Office, with airmail postage prepaid, addressed to the following parties:

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Houston, Texas 77002

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APPENDIX A

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 3742 TEXAS CIVIL STATUTES:

When any person may anticipate the institution of a

suit in which he may be interested, and may desire to perpetuate the testimony of a witness to be used in such suit, he, his agent or attorney, may file a written statement in the proper court of the county where such suit could be instituted, representing the fact and the names and residences, if known, of the persons supposed to be interested adversely to said person; a copy of which statement and writ shall be served on the persons interested adversely; or, where such person, his agent or attorney, shall at the time of filing such statement make affidavit that the names and residences of the heirs, successors or legal representatives of any deceased person are unknown to the affiant, or reside beyond the jurisdiction of the State, the clerk of the court or justice shall issue a like writ, which shall be served on such unknown or non-resident persons by publication in some newspaper in the mode and manner provided by law for the service of original citation upon non-residents or unknown parties; after which the depositions of such witnesses may be taken and returned by the parties making the said statement in the form and under the rules prescribed for taking testimony by deposition; and such testimony may be used in any suit which may be thereafter instituted by or between any of the parties to the statement, or those claiming under them, in like manner as if such depositions had been taken after the institution of such suit. When such suit has been instituted, all such depositions so taken and returned shall be subject to the like exceptions as other depositions. (Acts 1874, p. 103; P.D. 6829b; G.L. vol. 8, p. 105).

RULE 27, FEDERAL RULES OF CIVIL PROCEDURE

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action.

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony. As amended Dec. 29, 1948, effective Oct. 20, 1949.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with

a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4 (d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4 (d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17 (c) apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed. As amended Dec. 27, 1946, effective March 19, 1948.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 26(d). As amended Dec. 29, 1948, effective Oct. 20, 1949.

RULE 56, FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment

sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers

or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

RULE 187, TEXAS RULES OF CIVIL PROCEDURE

Rule 187. Deposition to Perpetuate Testimony

1. Petition. When any person may anticipate the institution of an action in which he may be a party, and may desire to perpetuate his own testimony or that of any other person to be used in such suit, he, his agent or attorney, may file a verified petition in the

proper court of any county where venue of the anticipated action may lie. The petition shall be in the name of the petitioner and shall show: 1) that petitioner anticipates the institution of an action in which he may be a party; 2) the subject matter of the anticipated action and his interest therein; 3) the names and residences, if known, or a description of the persons expected to be interested adversely to petitioner; 4) the names and addresses of the persons to be examined, the substance of the testimony which he expects to elicit from each, and petitioner's reasons for desiring to perpetuate such testimony; and 5) a request for an order of the court authorizing such petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

2. Notice and Service. The petitioner shall thereafter serve or cause to be served at least fifteen days before the date of hearing, a notice upon the witness, or witnesses, and upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court at a time and place named in such notice, for the order requested in the petition, and which notice may be served as provided in Rule 21a. If the verified petition states that the name or the residence of any expected adverse party is unknown to petitioner and his agent or attorney and cannot be ascertained after diligent inquiry, the clerk of the court or justice of the peace shall, on petitioner's request, cause the notice to any such party or parties to be published in some newspaper in the county where the

petition is filed if there be a newspaper published in such county, but if no newspaper be published in such county then in a newspaper in the nearest county where a newspaper is published, once each week for two consecutive weeks, stating the substance of the petition, the court in which it is filed and the number thereof, the name of petitioner and each of the witnesses and their addresses, the names and addresses of the expected adverse parties, if known, or a description of such parties, and that a hearing will be had on such petition at a designated time and place on or after the 14th day following the first publication of such notice. Provided, however, that in any case where justice or necessity so requires the judge or justice may permit the taking of such depositions upon shorter notice than herein prescribed, or may extend such time in order to permit service on any adverse party.

3. Application to Probate Will. An application or petition, or an anticipated application or petition, for the probate of a will shall be considered as a suit within the meaning and purport of this Rule; and, whenever any person in this State shall desire to perpetuate testimony for use in an anticipated application for the probate of a will, the notice, accompanied by a copy of the aforesaid petition may be served by posting as prescribed by Section 33(f) (2) of the Texas Probate Code, such notice to be directed to all parties interested in the estate of the testator and to comply with the requirements of Section 33(c) of said Code insofar as they may be applicable.

4. Order and Manner of Taking, Etc. The order of the court or justice authorizing the taking of such depositions shall direct that the commission to take the same shall issue forthwith, and such depositions shall be taken upon oral examination or written interrogatories as the court or justice may direct. The deposition rules not inconsistent with this rule shall apply to the taking, signing, returning, objections to, and use of such depositions. Any interested party may, after the filing in the court of any deposition taken under notice by publication under this rule, move to suppress said deposition, in whole or in part, by bill of review, such right to move to suppress to be cumulative of all other rights to attack or oppose said deposition. As amended by order of March 19, 1957, effective Sept. 1, 1957; April 12, 1962, effective Sept. 1, 1962.

ARTICLE 5507, TEXAS CIVIL STATUTES

Art. 5507. [5672] [3340] [3191] Three years' possession

Suits to recover real estate, as against a person in peaceable and adverse possession thereof under title or color of title, shall be instituted within three years next after the cause of action accrued, and not afterward. Acts 1841, p. 119; P. D. 4622; G.L. vol. 2, p. 621.

ARTICLE 5509, TEXAS CIVIL STATUTES

Art. 5509. [5674] [3342] [3193] Five years' possession

Every suit to recover real estate as against a person having peaceable and adverse possession thereof, cultivating, using or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds

duly registered, shall be instituted within five years next after cause of action shall have accrued, and not afterward. This article shall not apply to one in possession of land, who deraigns title through a forged deed. And no one claiming under a forged deed, or deed executed under a forged power of attorney shall be allowed the benefits of this article. Id., Acts 1879, p. 132; G.L. vol. 8, p. 1432.

ARTICLE 5510, TEXAS CIVIL STATUTES

Art. 5510. [5675-5676] [3343] Ten years' possession

Any person who has the right of action for the recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. The peaceable and adverse possession contemplated in this article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument. Id.; P.D. 4621-24.

ARTICLE 5519, TEXAS CIVIL STATUTES

Art. 5519. [5684a] [3352] Action barred in twenty-five years

No person who has a right of action for the recovery of real estate shall be permitted to maintain an action therefor against any person having peaceable and adverse possession of such real estate for a period of twenty-five years prior to the filing of such action, under claim of right, in good faith, under a deed or deeds, or any instrument or instruments, purporting to convey the same, which deed or deeds or instrument or instruments purporting to convey the same have been recorded in the deed records of the county in which the real estate or a part thereof is situated; and one so holding and claiming such real estate under such claim of title and possession shall be held to have a good marketable title thereto, and on proof of the above facts shall be held to have established title by limitation to such real estate regardless of coverture, minority, insanity or other disability in the adverse claimant, or any person under whom such adverse claimant claims, existing at the time of the accrual of the cause of action, or at any time thereafter. Such peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them. The adverse possession of any part of such real estate shall extend to and be held to include all of the property described in such deed or instrument conveying or purporting to convey, under which entry was made upon such land or any part thereof, and by instrument purporting to convey shall be meant

any instrument in the form of a deed or which contains language showing an intention to convey even though such instrument, for want of proper execution or for other cause is void on its face or in fact. Acts 1919, 2nd C.S., p. 139; Acts 1927, 40th Leg., p. 369, ch. 250, § 1.

ARTICLE 5519a, TEXAS CIVIL STATUTES

Art. 5519a. Title to land by limitation

In all suits involving the title to land not claimed by the State, if it be shown that those holding the apparent record title thereto have not exercised dominion over such land or have not paid taxes thereon, one or more years during the period of twenty-five years next preceding the filing of such suit and during such period the opposing parties and those whose estate they own are shown to have openly exercised dominion over and asserted claim to same and have paid taxes thereon annually before becoming delinquent for as many as twenty-five years during such period, such facts shall constitute prima facie proof that the title thereto had passed to such persons so exercising dominion over, claiming and paying taxes thereon.

Sec. 2. This Act shall in no way affect any Statute of Limitation or the right to prove title by circumstantial evidence under the present Rule of Decision in the Courts of this State nor to suits between trustees and their beneficiaries nor to suits now pending. Acts 1930, 41st Leg., 5th C.S., p. 162, ch. 30; Acts 1931, 42nd Leg., p. 288, ch. 169.

ARTICLE 5526, TEXAS CIVIL STATUTES

Art. 5526. [5687-98] [3354-63] [3203-12] Actions to be commenced in two years

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

5. Actions upon stated or open accounts, other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents. In all accounts, except those between merchant and merchant, as aforesaid, their factors and agents, the respective times or dates of the delivery of the several articles charged shall be particularly specified, and limitation shall run against each item from the date of such delivery, unless otherwise specially contracted. Acts 1841, p. 163; G.L. vol. 2, p. 627.

6. Action for injury done to the person of another.

7. Action for injury done to the person of another where death ensued from such injury; and the cause of action shall be considered as having accrued at the death of the party injured. Acts 1897, p. 12; Acts 1841, p. 163; Acts 1852, p. 128; P.D. 4604; G.L. vol. 10, p. 1066; G.L. vol. 2, p. 627; G.L. vol. 3, p. 1006.

8. Actions of forcible entry and forcible detainer.

ARTICLE 5527, TEXAS CIVIL STATUTES

Art. 5527. [5688] [3356] [3205] What actions barred in four years

There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.

2. Actions for the penalty or for damages on the penal clause of a bond to convey real estate.

3. Actions by one partner against his co-partner for a settlement of the partnership accounts, or upon mutual and current accounts concerning the trade of merchandise between merchant and merchant, their factors or agents; and the cause of action shall be considered as having accrued on a cessation of the

dealings in which they were interested together. Acts 1841, p. 163; P.D. 4604; G.L. vol. 2, p. 627.

APPENDIX B

ROSA ELLA GRAHAM BEASLEY, ET AL vs. W. P. H. McFADDIN

Opinion

THORNBERRY, Circuit Judge: This diversity suit is the second in a trilogy concerning the ownership of the Humphries survey. *See Humphries v. Texas Gulf Sulphur Company,* No. 24,985 (, 1968); *Green v. Texas Gulf Sulphur Company,* No. 24,854 (, 1968). The heirs in this case claim only an interest in the land. They mount essentially the same contentions as the heirs in the *Humphries* case in that they assert that the original grant was to Pelham and not William Humphries. Their distinctive argument is that the William Humphries who conveyed the land to Inglish in 1836 was not the heir of Pelham and thus had nothing to convey to Inglish. According to appellants, Pelham came to Texas in 1823 from Tennessee. He had a brother named William, under whom appellants claim as heirs; however, they assert that brother William did not convey to Inglish. Appellants think that the William who conveyed the land was not Pelham's brother because a genealogist who studied the matter made an affidavit to the effect that the grantor was another William Humphries who came to Texas from Kentucky and settled in Panola County. The genealogist also concluded that the William Humphries who made

the conveyance could not have been Pelham's brother because Pelham was still alive in 1836 and in fact did not die until 1837 or 1838. The district court rejected this argument and held that there was no proof by affidavit that the deed was forged. Apparently, the district judge thought the genealogist's affidavit did not comport with Rule 56, *Fed. R. Civ. P.* Since there was no proof that the Inglish deed was forged, the fact that Pelham died after 1836 could not help the heirs because in that event the property would go to brother William by the doctrine of after-acquired title and estop William and his heirs from challenging the validity of the deed to Inglish. The district court also held that appellees had gained title by adverse possession. For the reasons stated in *Humphries,* we need not discuss these contentions fully. Moreover, the reasoning there is sufficient to justify the holding that all the Humphries heirs, past, present and future are without title.

EURA MAE HIGGINBOTHAM GREEN, ET AL VS. THE TEXAS GULF SULPHUR COMPANY, ET AL

Opinion

THORNBERRY, Circuit Judge: This diversity suit is the third in a trilogy concerning the ownership of the Humphries survey. *See Humphries v. Texas Gulf Sulphur Company,* No. 24,985 (, 1968); *Beasley v. W.P.H. McFaddin,* No. 24,977 (, 1968). The heirs in this case claim only a mineral interest. They urge first that a tax deed in 1850 vested title in the State of Texas and second that if they could have the tax

deed set aside, they would be entitled to the minerals rather than appellees. Appellants joined the Commissioner of the General Land Office and sought a declaratory judgment that the tax deed was invalid. The State of Texas moved to dismiss the Commissioner on the ground of sovereign immunity, and the final judgment of the district court so ordered. The heirs attack this dismissal, contending that the suit could not properly be determined without consideration of the tax deed. Following his opinion in the *Humphries* and *Beasley* cases the trial judge granted appellees' summary judgment without commenting on the validity of the tax deed.

If the tax deed simply vested title in the State of Texas, the well-settled doctrine that a party in a trespass-to-try-title action must recover on the strength of his own title, not the weakness of his opponents', would preclude appellants' recovery. Thus their only relevant argument is that the tax deed was invalid and that the dismissal of the State of Texas on grounds of sovereign immunity was improper under *McGuire v. Sadler,* 5th Cir. 1964, 334 F.2d 902 and requires a remand to determine the validity of the tax deed. Whatever the soundness of that argument, our reasoning in *Humphries* and *Beasley* confirms that all Humphries heirs are without title and renders a remand unnecessary. Appellants cannot use the shield of sovereignty to escape the conclusive effect of their own 125 years of complete non-claim.

M. T. HUMPHRIES, ET AL vs. TEXAS GULF SULPHUR COMPANY, ET AL

Opinion

THORNBERRY, Circuit Judge: This diversity action proves that unlike old soldiers, expectant heirs never even fade away. It is one of a trilogy that hopefully will terminate the continuing battle between the heirs and the active users of the Humphries survey. In deciding who owns the Humphries survey we must consider problems of Texas land law and more particularly that fascinating though somewhat abstruse part concerning the validity and effect of the ancient Spanish land grants that form the foundation for innumerable ownership rights in Texas. The land involved in this case, known as the Humphries survey, is located in Southeast Texas. It has made an enormous economic contribution to the state, primarily because of the famed Spindletop Oil Field discovered there in 1901. Appellees have claim to the land under rights that extend back to 1836, but the active use of the land is best documented from 1884. Despite these claims, the heirs argue that they deserve to share the land and mineral rights with appellees. Before discussing these demands, a skeletal history of the ownership of the land is helpful. On February 14, 1835, a land grant for a league of land (4,428 acres) was issued by the Government of Coahuila and Texas to a colonist named "Pelham" or "William" Humphries. The next relevant conveyance is from William Humphries by general warranty deed to William Inglish on February 14, 1836, recorded in 1860 in Jefferson County.

Next, the children or heirs of Inglish conveyed the land to W. P. H. McFaddin by deed dated December 31, 1883, recorded January 10, 1884. Texas Gulf Sulphur claims its rights to the mineral estate from conveyances and mineral leases made by McFaddin and his transferees.

All the appellants in the *Beasley, Green* and instant case claim as heirs of either "Pelham" or "William" Humphries. Each set of heirs has, however, a different theory to justify its demand for the land or minerals: In the instant case the assertion is that the land was granted to Pelham and not William Humphries and that all subsequent conveyances are therefore fraudulent; in the *Beasley* case the assertion is that the William Humphries who conveyed to Inglish was not the heir of Pelham and consequently had nothing to convey; finally, the *Green* case presents the issue of whether a tax deed in 1850 vested title to the land in the State of Texas. Although these assertions will be considered separately, what is said here is also dispositive of the *Beasley* and *Green* appeals.

Appellants in the instant case claim only a mineral interest in the land. They have mounted a vigorous attack on the entire chain of title based on numerous technical points of Texas land law and the general history of Texas from 1836 to the present. Their main point is that the original grant in 1835 was to Pelham and not William Humphries. The basis for this contention is that in the original grant the colonist named throughout is Pelham, except that in the first line the name "William" has been interlined over the

name "Pelham." That interlineation has generated all the controversy surrounding this land. The thrust of appellants' argument is, therefore, that all subsequent conveyances have been fraudulent and that the land at all times has remained in the Pelham Humphries family. Appellees have offered evidence that the colonist was in fact William Humphries. This was done by connecting various events surrounding the original grant in order to identify the original grantee. They showed that on September 24, 1834 a certificate of character was granted to a man named William Humphries; that it was a man named William Humphries who signed a bond of title obligating him to convey the land to Inglish; and that it was a William Humphries who received the labor of land (170 acres) that went only to the man who got the original grant. From these facts appellees urged that since it is agreed that only one valid grant was issued to a man named Humphries, it is more reasonable to conclude that his name was William.

Appellants also attack the deed from William Humphries to Inglish as a forgery. Another conveyance which adds further mystery to the ownership rights to this land is also challenged as a forgery. This conveyance is for the same tract of land described in the Inglish deed and is from Pelham Humphries to Snively on September 7, 1857, recorded in Jefferson County, January 5, 1861. The court below rejected all of appellants' claims and granted summary judgment for appellees, reasoning that whether the land was granted to Pelham or William, the deeds from William Humphries to Inglish and from Pelham Humphries to

Snively were valid and divested any Humphries heirs of title. Its decision was based on the fact that affidavits of forgery filed by appellants did not impeach either deed since the affidavits were based on belief and presented no admissible factual evidence to sustain the plea. The court also concluded that appellees gained title to the land by adverse possession.

Another basis also utilized by the district court permits affirmance of the summary judgment without immersing this Court in the factual thicket surrounding the controversy. Thus we affirm the summary judgment because the absolute non-use of and non-claim to the land by appellants and their predecessors for more than 125 years, when measured against appellees' active use and claim, justify the imposition of a conclusive presumption that all the Humphries heirs have lost their title. We adopt this approach because it is the one that Texas courts have taken recently in dealing with problems of ownership rights based on old Spanish land grants. These cases establish a rule that acquiescence by a former owner and his descendants in the possession and assertion of ownership of land on the part of another affords a basis for finding that title passed to the possessor by deed or otherwise. Moreover, creation of this presumption of the passage of title provides an excellent shorthand way to put a judicial stop to the Pelham Humphries litigation. These endless suits have been an harassment to the land and mineral owners as well as a useless expense of time and money by litigants and courts. Finally, the facts of this case are peculiarly suited to the creation of a conclusive presumption. Our brief en-

counter with this litigation has uncovered a controversy so complicated, conflicting and confusing that no one will ever really know the exact history of the land. Indeed, courts have been rather ambivalent about who got the land. There are decisions that indicate the grant was to Pelham, *Glover v. McFaddin*, 5th Cir. 1953, 205 F.2d 1, while others support the assertion that the grant was really to William, *McBride v. Gulf Oil Corp.*, 292 S.W.2d 151 (Tex. Civ. App.—Beaumont 1956, writ ref'd n.r.e.). The death of Pelham Humphries is also a mystery. The Glover court said he died in 1835; there is evidence in the *Beasley* case that he died in 1837 or 1838; and in the instant case there is an intimation that he was still alive in 1866. Consequently, attention will now be directed to the Texas decisions to ascertain when and why this presumption arises.

Texas courts have created a conclusive presumption that an heir is without title on numerous occasions. The decision of *Page v. Pan American Petroleum Corp.*, 381 S.W.2d 949 (Tex. Civ. App.— Corpus Christi 1964, writ ref'd n.r.e.) provides a god illustration. There the grant was issued in 1829 to the mother of J.W.P. and S.H.P. The mother later died intestate in 1833, leaving her sons as heirs. In 1839, by a deed recorded in 1840, J.W.P. conveyed all of his right, title, and interest in the land to Sweeny. As there was no record of a conveyance out of S.H.P., the plaintiffs claimed to have inherited his half interest. The defendants claimed record title from Sweeny and the J.W.P. deed. They asserted that the long and notorious claim of title and dominion, payment of taxes, and the long acquiescence of plaintiffs and those under whom they

claimed established as a matter of law that in some manner the title now asserted had passed from plaintiffs' ancestors and was now owned by them. The court agreed with this argument and granted summary judgment for the defendant. It reasoned that the long non-assertion of claim to the land could only be explained by a conveyance from plaintiffs' ancestors, either by an oral conveyance, lost deed, or an unrecorded deed. By granting summary judgment, the court made the presumption irrebutable:

> However, as to whether an issue of fact or a question of law is presented depends upon the entire record of each case. And when, as in the present case, the record clearly presents a situation where, in the total absence of any facts to the contrary, reasonable minds could reach no other conclusion but that the long continued and undisturbed possession and claims of title, acquiesced in by plaintiffs ancestor from whom they claim for over fifty years and by his descendants for another sixty years, could be explained only by the presumption of an unrecorded conveyance, the court will presume such a conveyance as a matter of law.

381 S.W. 2d 949, 954.

The facts of the instant case justify application of the holding in *Page*. When McFaddin got the grant from Inglish, he fenced the entire league except the side on the Neches River. He used the land for

farming and pasturing; built a ranch house and tenant house; made other improvements; and he and his descendants have remained on the land from 1884 until the present. In 1900, the land was leased to Lucas, who in 1901 brought in the "Lucas Gusher" that started the Spindletop oil production. This oil production still continues. In 1956, Texas Gulf Sulphur started sulphur production. Presently there are seventy-five wells. Thus it is apparent that from 1884, there have been eighty years of uninterrupted possession and continuous use of the land. Appellees and their predecessors have also paid all the taxes. In stark contrast to this productive use is the absolute non-claim and inactivity by appellants for more than 125 years. Indeed, there is no evidence that appellants or their predecessors ever had possession of the land, paid any taxes, exercised any dominion over the land, or even asserted a claim to it. Nor is there any evidence to suggest that the conveyances presumed were not in fact made. All appellants have done is attempt to impeach all the known conveyances in order to prove that Pelham Humphries never parted with the land so that it descended to them. It would seem that this evidence really suggests that all concerned have treated this Inglish deed as valid; however, even excluding this deed from consideration, there is not one shred of evidence to rebut the presumption that Pelham or William Humphries made other conveyances. Accordingly, as in *Page*, reasonable minds could reach no other conclusion but that the non-claim by appellants can only be explained by the presumption of an unrecorded conveyance. At this late date, when the occupiers have

acquired the general reputation of being owners of the land by paying the taxes, using the land, and have had their title recorded in the county where the land is located for so long, it would be unconscionable to award the heirs the land and minerals based on the evidence presented to the district court. *See Purnell v. Gulihur,* 339 S.W.2d 86 (Tex. Civ. App. — El Paso 1960, writ ref'd n.r.e).

The *Page* decision gives cogent policy reasons for our holding:

> Since it is not consistent with human experience for one really owning property of value to assert no claim thereto, but to acquiesce for a long period of time in an unfounded, hostile claim, the rule is sound which permits the inference that an apparent owner has parted with his title from evidence, first, of a long-asserted and open claim, adverse to that of the apparent owner; second, of a non-claim by the apparent owner; and third, of acquiescence by the apparent owner in the adverse claim.
>
> The rule is essential to the ascertainment of the very truth of ancient transactions. Without it, numberless valid land titles could not be upheld. Its application becomes more and more important with the passing years, as it becomes more and more difficult to get living witnesses to that which long ago trans-

pired. Magee v. Paul, 110 Tex. 470, 221 S.W. 254, 256.

381 S.W.2d 949, 952.

Further support is found in the decisions indicating that Texas courts are disposed to extend rather than restrict the application of the presumption of a deed, *Duke v. Houston Oil Co. of Texas,* 128 S.W.2d 480 (Tex. Civ. App — Beaumont 1939, writ ref'd n.r.e), because it is more reasonable to conclude, after those who know the facts are dead, that the ones who are in the enjoyment of the property and have remained there for a long time have better right to it. *See Bordages, supra* at 792. This extension has been viewed by some courts as consistent with the public policy of the state as expressed in *Tex. Rev. Civ. Stat. Ann.* art. 5519a (1958):

> In all suits involving the title to land not claimed by the State, if it be shown that those holding the apparent record title thereto have not exercised dominion over such land or have not paid taxes thereon, one or more years during the period of twenty-five years next preceding the filing of such suit and during such period the opposing parties and those whose estate they own are shown to have openly exercised dominion over and asserted claim to same and have paid taxes thereon annually before becoming delinquent for as many as twenty-five years during such period, such facts shall constitute prima facie

> proof that the title thereto had passed to such persons so exercising dominion over, claiming and paying taxes thereon.
>
> Sec. 2. This Act shall in no way affect any Statute of Limitation or the right to prove title by circumstantial evidence under the present Rule of Decision in the Courts of this State nor to suits between trustees and their beneficiaries nor to suits now pending. Acts 1930, 41st Leg., 5th C.S., p. 162, ch. 30: Acts 1931, 42nd Leg., p. 288, ch. 169.

This statute suggests another way by which the apparent owners to property can be divested of title and it is independent of both the adverse possession statutes and the presumption-of-a-deed doctrine. It is clear from the face of the statute that appellees have brought themselves squarely under its panoply and are entitled to its protection. *Love v. McGee*, 378 S.W.2d 96 (Tex. Civ. App. — Texarkana 1964, writ ref'd n.r.e.); *Purnell v. Gulihur, supra* at 91; *Duke v. Houston Oil Co. of Texas, supra* at 486.

Underpinning all these decisions is the salutary policy that courts should seek to quiet title to land, especially where the land has been claimed a long time and where it is difficult to ascertain if the user has complete record title. *See Purnell v. Gulihur, supra* at 92; *Bordages v. Stanolind Oil & Gas Co., supra* at 791. *Page* indicates that in situations like the present one, this policy is best implemented by awarding the land to the users who have made it

economically productive. It is simply not rational to assume that more than 125 years would have passed without a claim being made to the land if there were any substance to the claims. Such a policy is anchored on a practical and correct view of human nature, as reflected by the Texas cases, that men seldom have rights of value which are unknown to them, and more seldom still will men suffer themselves to be deprived of the enjoyment of these rights for any length of time. It also prevents time, which should heal the scars on title, from gradually undermining the title to land. Perhaps the best summation for all that has been said is found in the expressive opinion of Judge Simonton in *United States v. Deveraux*, 4th Cir. 1898, 90 Fed. 102, 107:

> After this great lapse of time, cit., a will presume anything and everything to have been done which, if done, would be a bar to the claim. Id. 869; Roe v. Ireland, 11 East, 280. This rule of presumption is one of policy as well as of convenience, and necessary for the peace and security of society. 'If time', said Lord Plunkett, 'destroys the evidence of title, the law has wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with a scythe in one hand to mow down the muniments of our rights, but in his other hand the lawgiver has placed an hourglass, by which he metes out incessantly those portions of duration which render needless the evidence he has swept away.' Whart Ev. ¶1338, note 5.

> It is not necessary to presume that a deed was, in point of fact, executed. It is sufficient if the evidence leads to the conclusion that a conveyance might have been executed, and that its existence would be a solution of the difficulty arising from its mere execution. Fletcher v. Fuller, 120 U.S. 546, 547, 7 Sup. Ct. 667; McLeod v. Rogers, 2 Rich. Law 22. Presumption does not operate like the statute of limitations, and bar a right which is known to exist; or like laches, which deprives one of a right which did exist. It operates as evidence and establishes the conclusion that the right which did exist has been duly relinquished by the possessor of it.

For these reasons, the failure of appellants and their predecessors to assert any claim to the land, to use it, or pay the taxes confirms that the original Humphries grantee, whether his name was Pelham or William, at some time in the past parted with title.

This holding is not aborted by the final point raised by appellants. They assert that the Spanish land grants never vested the mineral interest in the owners of the land and thus that appellees' occupancy of the surface can give them no claim to the minerals. Appellants have correctly noted that at the time the grant was made to Humphries the Mexican Government retained the rights to the minerals. After the Texas Revolution, this mineral interest vested in the Texas Government by right of con-

quest. Then in 1866, by constitutional amendment the Texas Government released to the owners of the soil the right to the mineral interest. Appellants interpret this historical background as proving that they, as the heirs of Humphries, became entitled to the mineral interest. Essentially they contend that when Humphries conveyed to Inglish, the latter did not get the mineral interest. Next, since the surface and mineral estates were severed and were of equal dignity, the amendment of 1866 could not accomplish a merger of the estates. Consequently, the mineral interest did not go to Inglish in 1866, but instead back to Humphries. Although it is a novel and provocative argument, it has been unanimously rejected. *See Jones v. McFaddin,* 382 S.W.2d 277 (Tex. Civ. App. — Texarkana 1964, writ ref'd n.r.e.) and cases cited therein; Masterson, *Severance Of The Mineral Estate by Grant Of Land By the Sovereign and Adverse Possession, 30 Texas L. Rev.* 321 (1952). These authorities indicate that the common-law doctrine of merger does not apply to a constitutional amendment and that the very purpose of the 1866 amendment was to assure that the owner of the surface came to hold the general title precisely as the general title was held prior to the first grant and to quiet title by barring the assertion of ancient rights under a multiplicity of technical claims.

The Pelham Humphries litigation is over and the Humphries heirs have no title in the league of land.

JUDGMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24,977

(D.C. Docket No. CA 4916)

ROSA ELLA GRAHAM BEASLEY, ET AL,
Appellants,

versus

W. P. H. McFADDIN, JR., ET AL,
Appellees.

Appeal from the United States District Court for the Eastern District of Texas

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Before JONES, WISDOM and THORNBERRY, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment

of the said district court in this case be, and the same is hereby affirmed.

It is further ordered and adjudged that the appellants, Rosa Ella Graham Beasley and others, be condemned in solido, to pay the costs of this cause in this court for which execution may be issued out of the said district court.

April 9, 1968

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FILED
AUG 2 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 272

ROSA ELLA GRAHAM BEASLEY, et al, *Petitioners*

v.

W. P. H. McFADDIN, et al, *Respondents*

RESPONDENTS' BRIEF OPPOSING THE PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Reasons Why Certiorari Should Not Be Granted	3
No Issuable Facts	6
Conclusion	8
Certificate	9

LIST OF AUTHORITIES

CASES	Page
Allen v. Boggess, 94 Texas 83, 58 S.W. 833	5
Baldwin v. Root, 90 Texas 546, 40 S.W. 3	4
Barrow v. Boyles, 122 Texas 416, 61 S.W.2d 783	4
Blaffer v. State, 31 S.W.2d 172	4
Carino v. The Philippine Islands, 212 U.S. 449	4
Clark v. Ganutt, 138 Texas 558, 161 S.W.2d 270	4
Erie v. Tompkins, 304 U.S. 64	4
Harris v. O'Connor, 185 S.W.2d 993	4
Haynes v. State of Texas, 100 Texas 427, 100 S.W. 915	4
Herndon v. Casiano, 7 Texas 331	4
Houston Oil Co. v. Village Mills Co. (Sup. Ct.) 241 S.W. 122	4
Johnston v. Smith, 21 Texas 722	4
Jones v. Siler, 129 Texas 18, 100 S.W.2d 352	5
Lindsay v. Freeman, 83 Texas 259, 18 S.W. 727	4
Mancha v. Field, 62 Texas 135 (141)	4
McKee v. Stewart, 139 Texas 260, 162 S.W.2d 948	5
Ross v. Sutter, 223 S.W. 273	4
Snow v. Letcher, 154 S.W. 355 (Writ Refused)	5
St. Louis Royalty Co. v. Continental Oil Co., 193 Fed.2d 778	5
Sullivan v. Dimmit, 34 Texas 114	4
United States v. Chavez, 175 U.S. 509	4
United States v. Pico, 72 W.S. (5 Wall) 536	4

MISCELLANEOUS	
Act, Congress of the Republic of Texas, February 5, 1840, 2 Gammel's Laws 154	4

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May it please the Court:

The respondents respectfully pray this Court not to review this cause but to deny the petition for writ of certiorari, because of the following:

The questions presented are foreign to the decision of the Court of Appeals.

1. Petitioners' complaint that the depositions perpetuating testimony are violative of due process under the Fifth and * is theoretical and without substance to affect the decision of the Court of Appeals, [393 Fed. (2) 68, 69, 67] in that:

(a) Petitioners' non-assertion of claim, and repondents and their predecessors' claim, for more than

* Fourteenth Amendments to the Constitution of the United States

125 years are conclusive, as a matter of law, that petitioners cannot recover the land in controversy.

(b) Respondents' unquestioned active claim and exclusive continuous adverse possession and use of the land under recorded deeds for more than 50 years, and the total absence during such period of any claim by petitioners, require the conclusive legal presumption that respondents have title.

(c) The conveyance of the land in 1836 by William Humphries to William English by duly recorded deed, not challenged by petitioners for more than 125 years, is conclusive that petitioners have no title, petitioners claiming under William Humphries.

(d) Respondents' have title also under the three year, the five year, the ten year, and the twenty-five year statutes of limitations of the State of Texas.

(e) The depositions perpetuating the testimony were taken in accordance with the laws of the State of Texas, and the truth of no statement by any witness is challenged or denied by petitioners.

(f) The sworn statements of the witnesses in the depositions were admissible as affidavits given, after due notice, in a public proceeding, and filed as a public record for over 25 years.

(g) The depositions are merely cumulative to the evidence from recorded instruments and numerous uncontroverted affidavits establishing the unchallenged claim, possession and use of the land by respondents and their predecessors for more than 50 years prior to the filing of this suit.

2. Petitioners' complaint that there is an issue as to a material fact is without merit. No statement is made in Mrs. Carr's affidavit (the only affidavit filed by petitioners) relating to either of the grounds of the Court of Appeals' decision as set out in subparagraphs a, b, and d of paragraph 1 above; and she at no place and in no manner contradicts the records and affidavits filed, and submitted by respondents supporting such three grounds. Further, her affidavit shows on its face that it was not made on personal knowledge; it sets forth no material facts admissible in evidence, but consists merely of hearsay and her conclusions, speculations and opinions as to matters not made on her personal knowledge.

Reasons why Certiorari Should not be Granted

The Court of Appeals decided this cause against petitioners upon grounds entirely foreign to the matters complained of by petitioners. No constitutional provision or issuable question of fact is remotely involved, as is apparent from the Court's opinion [393 Fed.(2) 68, 69].

The Court of Appeals turned its decision on three grounds, neither of which was factually or constitutionally challenged, and neither is challenged by petitioners in their Application for Writ of Certiorari.

These grounds upon which the Court of Appeals decided this cause are as follows:

First: During the 125-year period from 1836 until this suit was filed the petitioners and those under whom they asserted title, made no claim of any kind or character to the land in controversy. Petitioners do not deny the fact of their nonclaim and nonuse of the property for

the-more-than 125 years since William Humphries executed his deed to William English in 1836. The legal effect of this 125-year nonclaim, under both state and federal law, presumptively and conclusively, divested petitioners of any right they may have ever had to the land.

Additional to the authorities cited in the opinion of the Court of Appeals are the following:[1]

Second: Petitioners claim under William Humphries who they say took title to the land when his brother Pelham died after 1836. They say no title to the land was conveyed by the deed executed by William Humphries to William English in 1836. Petitioners overlook the law in Texas that William Humphries' warranty deed to William English[2] had the legal effect to pass to his vendee any title outstanding at the date of his deed. Having executed the deed when he had no title he was estopped from asserting against English any title that he may thereafter have acquired.[3]

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1. Act, Congress of the Republic of Texas, February 5, 1840, 2 Gammel's Laws of Texas 154; Mancha v. Field, 62 Texas 135 (141); Herndon v. Casiano, 7 Texas 331; Sullivan v. Dimmit, 34 Texas 114. (125); Erie v. Tompkins, 304 U.S. 64; Johnston v. Smith, 21 Texas 722; Barrow v. Boyles, 122 Texas 416; 61 S.W.2d 783; Harris v. O'Connor, 185 S.W.2d 993; Herndon v. Casiano, 7 Texas 331; Ross v. Sutter, 223 S.W. 273; Blaffer v. State, 31 S.W.2d 172; Haynes v. State of Texas, 100 Texas 427; 100 S.W. 915; United States v. Pico, 72 W.S. (5 Wall) 536; and United States v. Chavez, 175 U.S. 509, Carino v. The Philippine Islands, 212 U.S. 449.

2. R. Vol. I, p. 307.

3. Clark v. Ganutt, 138 Texas 558; 161 S.W.2d 270; Lindsay v. Freeman, 83 Texas 259; 18 S.W. 727; Baldwin v. Root, 90 Texas 546; 40 S.W. 3; Houston Oil Co. v. Village Mills Co. (Sup. Ct.) 241 S.W. 122.

Third: The Court of Appeals held that respondents perfected title by adverse possession. Petitioners do not deny the use and occupancy of the land by respondents and their predecessors for at least 50 years, as is reflected by the affidavits of [redacted] witnesses in the record.[4]

Petitioners state, on page 11 of their petition, that respondents' title by limitation turns solely on whether it was the "intention" to hold the land in question. The intention by respondents and their predecessors is established as a matter of law by the 1836 deed from William Humphries to William English,[5] and by the deed from the children and grandchildren and heirs of William English to W.P.H. McFaddin on December 31, 1883, recorded January 10, 1884.[6] Many subsequent instruments bring the title down into the respondents.[7]

These title deeds without other proof establish as a matter of law the adverse intention and possession of respondents and their predecessors for considerably more than 50 years.[8]

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4. C.F., Vol. I: of Mr. W.P.H. McFaddin, p. 100; Mr. Martens, p. 104; Mr. Hamman, p. 137; Mr. Brady, p. 143; Mr. J.L.C. McFaddin, p. 151; Mr. Myers, p. 165; Mr. Watkins, p. 418.

5. R. Vol. II, p. 320-324; C.F. Vol. I, p. 12-14.

6. C.F. Vol. I, 17-22.

7. Index C.F. Vol. I numbered 2 (1) to (11) on pages I and II; numbered 3 (1) to (14) on pages III, IV, and V; and numbered 6 (2) to (6) on pages V and VI.

8. Jones v. Siler, 129 Texas 18; 100 S.W.2d 352; McKee v. Stewart, 139 Texas 260; 162 S.W.2d 948; St. Louis Royalty Co. v. Continental Oil Co., 193 Fed. 2d 778; Snow v. Letcher, 154 S.W. 355 (Writ Refused); Allen v. Boggess, 94 Texas 83; 58 S.W. 833.

The affidavits referred to are not denied, or controverted, and they establish that more than 50 years before this suit was filed McFaddins (respondents' predecessors in title) under their recorded deeds, entered upon the league of land, possessing and using all of the lands in controversy, for farming, for pasturing, for the production of oil; and beginning 14 years before the suit was filed began mining sulphur, as well as continuing other uses of the land. These affidavits reflect the unbroken and continuous possession and use of the land day-in and day-out by respondents and their predecessors without break for more than 50 years, together with the payment of taxes. During all of this period and at all times prior thereto from 1836 petitioners asserted no claim, had no possession and made no use of any of the land.

No Issuable Facts

Respondents deny the existence of any issuable fact in this case. Petitioners do not assert that they made any claim or use, or had any possession, of the land from 1836 until they filed this suit. Consequently title passed to respondents by legal presumption.

Petitioners present no fact as to their assertion that William Humphries did not execute the 1836 deed to William English. Mrs. Carr's affidavit raises no "issue of identity" as to William Humphries. She states she was born in 1896. She states no relationship to the petitioners. She herself stated, "I qualify as an expert to testify as to just who are the heirs of Pelham Humphries, deceased".[9] To obtain her information she claimed that she investigated records of numerous kinds "of almost every de-

9. R. Vol. II, p. 434.

scription", and she talked to people who she said had knowledge.[10] Her affidavit clearly is based on no personal knowledge of any kind or character, nor on relationship. So it is not admissible to show family history, pedigree, relationship or other evidentiary fact entitled to any weight.

The record reflects over fifty years undisputed adverse possession by the McFaddins and these other respondents. Mrs. Carr made no statement, by conclusion or otherwise, as to the nonclaim of the petitioners or as to the claim, use and occupancy by Respondents and their predecessors in title.

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10. R. Vol. II, p. 432-433.

CONCLUSION

Respondents under the record have presumptive title as a matter of law, hold title under the 1836 deed from William Humphries to William English, and under the 3, 5, 10 and 25-year statutes of limitations have had the peaceable and adverse possession sufficient to vest title under the limitation statutes for Texas.

It is respectfully prayed that the Writ of Certiorari be denied.

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Certificate

I, Major T. Bell, attorney for respondents, on this the _____ day of July, 1968, have served copies of this respondents' brief opposing the petition for writ of certiorari on the petitioners named therein by depositing the same in the United States Post Office, with first class postage prepaid, addressed to the Hon. Richard H. Cocke, the attorney for the petitioners, 604 Capital National Bank Building, Houston, Texas, 77002, by United States Certified Mail, with return receipt requested.

_____

Major T. Bell